



**Sirma v Independent Electoral and Boundaries Commission & 2 others (Election  
Petition 1 of 2017) [2022] KEHC 10252 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10252 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
ELECTION PETITION 1 OF 2017  
WK KORIR, J  
JUNE 30, 2022**

**BETWEEN**

**MUSA CHERUTICH SIRMA ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**ELDAMA RAVINE CONSTITUENCY RETURNING OFFICER (NDIRANGU  
PETER KURIA) ..... 2<sup>ND</sup> RESPONDENT**

**MOSES LESSONET ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in regard to two applications all brought under certificate of urgency by Musa Cherutich Sirma, the Petitioner in the election petition. The first application is dated 4<sup>th</sup> October, 2021. It is a notice of motion founded on section 84 of the [Elections Act](#); Articles 159 and 165 of [the Constitution](#); order 9 rule 9 and order 42 rule 6 of the [Civil Procedure Rules, 2010 \(CPR\)](#); sections 1A, 3 & 3A of the [Civil Procedure Act, cap. 21 \(CPA\)](#); and all other enabling procedures of the law. In the application, the Applicant seeks orders as follows:
  - a. That this Honourable Court be pleased to certify this application as urgent and heard on priority basis and service of the same be dispensed with at the first instance.
  - b. That the Honourable Court be pleased to grant the Applicant leave to lodge this reference out of time, owing to the manifest illegalities in cost claims by the Respondents.
  - c. That the Honourable Court be pleased to grant stay of execution and/or further proceedings herein pending the hearing and determination of this Application.



- d. That the Honourable Court be pleased to grant a stay of execution of costs of Kshs.4,000,004,200/= (sic) by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Kshs.300,423/=, by the Interested Party and Kshs. 750,000/= by the 3<sup>rd</sup> Respondent as claimed pending the hearing and determination of the reference herein filed.
  - e. The cost of this application be provided for.
2. The application is premised on the grounds on its face and the Applicant's affidavit sworn on the date of the application.
  3. When the Applicant approached this Court with the above application, I granted him an order of stay of execution on condition that he deposited Kshs. 5,000,000/= in Court within 90 days from the date of the order. As will shortly be seen, this stay order has given rise to the second application which is the subject of this decision.
  4. For record purposes, there is also a chamber summons application dated October 4, 2021 brought under order 11(2) of the Advocates Remuneration Order through which the Applicant seek orders as follows:
    - a. The part of the Taxing Master's decision delivered on the 1<sup>st</sup> August, 2019 which relates to instruction fees on proclamation and which was taxed and allowed at Kshs. 300,423.00, taxed and allowed as drawn, be reviewed for being irregular and accordingly set aside.
    - b. The Bill was drawn by a stranger to the proceedings herein, noting the special nature of such discourses, and more precisely Gillete Auctioneers, and One Phillip Mwaura at the instance of the 3<sup>rd</sup> Respondent, with a likely similar claim from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
    - c. The net effect of this assessment and eventual taxation is irregular enhancement of the fixed global costs, devoid of the pursuit of the ordained channels, more so an appeal or a regular review hence the claim of 3000,423/= by the Interested Party, Kshs. 750,000/= by the 3<sup>rd</sup> Respondent and Kshs. 4,004,200/= by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
    - d. The Court do reconsider and vary to appropriate figures as had been awarded by the trial court, the instruction fees and all other figures claimed irregularly so.
    - e. The cost of this Application be provided for.
  5. The application is supported by the grounds on its face and the already mentioned affidavit sworn by Applicant in support of the notice of motion already referred to hereinabove. This application is the reference for which leave is sought, in the notice of motion, to be filed out of time. The determination of the already recited notice of motion will take care of this chamber summons application.
  6. The second application which is the subject of this ruling is the notice of motion dated January 20, 2022. The same is brought under article 159 of *the Constitution*, order 45 rule 1 of the *CPR*, section 80 of the CPA, section 84 of the *Elections Act*, and all other enabling provisions of the law. Through the application, the Applicant seeks the following orders:
    - a. That the Honourable Court be pleased to certify this application as urgent and heard on priority basis and service of the same be dispensed with at the first instance.
    - b. That the Honourable Court be pleased to review, set aside and vary its order for deposit of Kenya Shillings Five Million (KSh. 5,000,000/=) herein pending the hearing and determination of the motion dated 4<sup>th</sup> of October, 2021.



- c. That the Honourable Court be pleased to grant any other relief it deems fit.
7. The application is supported by the grounds on its face and an affidavit sworn by the applicant on the date of the application. Owing to the fact that this application springs from the orders issued by this court pursuant to the first application, it follows that the same can only be considered, if need be, once the fate of the first application has been determined.
8. A brief history is necessary. The applicant and the 3<sup>rd</sup> respondent, Moses Lessonet, were among those who vied for the Member of the National Assembly seat for Eldama Ravine Constituency in the general election of August 8, 2017. At the conclusion of the exercise, the 2<sup>nd</sup> respondent, the Eldama Ravine Constituency Returning Officer (Ndirangu Peter Kuria), and by extension the 1<sup>st</sup> Respondent, the Independent Electoral and Boundaries Commission (IEBC), declared the 3<sup>rd</sup> Respondent (hereinafter Mr. Lessonet) the winner of the contest. The Applicant (hereinafter Mr. Sirma) was aggrieved by that decision and exercised his right by challenging the election of Mr. Lessonet through Kabaronet High Court Election Petition No. 1 of 2017. The petition was dismissed by Edward M. Muriithi, J in a judgement delivered on 2<sup>nd</sup> March, 2018. Relevant to this ruling is the order on costs which reads as follows:
- “The petitioner did not succeed in the principal complaints of violence, bribery and expulsion of agents as to render the election to be contrary to the provisions of article 81 of *the constitution*, and the irregularities proved do not affect the results. The Petitioner unnecessarily exacerbated costs by filing multiple applications for scrutiny in the Petition and at interlocutory stage while upon their being deferred by the court to the close of hearing, he abandoned the application on the date of hearing of the application.
- The Petitioner, having caused unnecessary expense to the Respondents in defending the multiple applications for scrutiny and extension of time for provision of read only access to the Kiems Kits, is pursuant to Rule 30(2) (b) of the Election (Parliamentary and County Elections) Petition Rules liable to pay the Respondents for the costs of those applications, in addition to costs under the principle that costs follow the event. In accordance with Rule 30 (1) (a) the court makes order for the total amount of costs payable by the Petitioner to the Respondents at Ksh.2,000,000/- for each respondent.”
9. The decision on costs has spawned several applications by Mr. Sirma which have resulted in various rulings. The applications which are the subject of this ruling are of that ilk.
10. Mr. Sirma’s case is that the judgement in the election petition capped the costs awarded to the respondents at Kshs. 4,000,000/= and subject to taxation but the respondents have exceeded the awarded costs by deliberate misrepresentation of the orders on costs. He avers that this misrepresentation of the judgement has led to an illegal proclamation devoid of jurisdiction. His case is that he only became aware of the respondents’ claims in 2022 and in particular the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ claim of Kshs. 4,004,200/= which was excess and in breach of the law.
11. Mr. Sirma contends that the amounts the respondents seek to recover from him are products of illegal taxations and there is need to relook at the said sums. Further, that the respondents have expanded the decree beyond the legal limits and the proclamation is fraught with illegality. His case is that the amount claimed by the respondents as costs is way above the limit imposed by the Election Court.
12. According to Mr. Sirma, Mr. Lessonet through the auctioneer has opted for ransom as his preferred mode of engagement despite the grave illegalities in the proclamation. He relies on the contents of the



Chamber Summons dated 4<sup>th</sup> October, 2021 seeking to set aside the taxed bill of the auctioneer's costs in support of his claim that the proclamation is attended by illegalities.

13. Still attacking the auctioneer's bill of costs, Mr. Sirma avers that the bill that was taxed at Kshs. 300,423/= by the taxing master on 1<sup>st</sup> August, 2019 was drawn by a stranger namely Philip Mwaura of Gillete Auctioneers. According to Mr. Sirma, the award of costs to the auctioneer was irregular as it took the amount of costs outside the fixed global costs awarded to the respondents. The Court is urged to make an appropriate award in place of the taxation allegedly irregularly made by the taxing master.
14. It is Mr. Sirma's averment that the claim of Kshs. 6,000,000/= by the respondents as costs is mistaken since the respondents were awarded costs capped at Kshs. 4,000,000/=. His interpretation of the decision on costs is that Mr. Lessonet was awarded Kshs. 2,000,000/= whereas the 1<sup>st</sup> and 2<sup>nd</sup> respondents were jointly awarded Kshs. 2,000,000/=.
15. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application through a replying affidavit sworn on 10<sup>th</sup> December, 2021 by their advocate, Jackson Mwangi. His averment is that the application is misplaced, an abuse of the court process and a mere ploy deliberately aimed at evading the course of justice with a view to depriving the 1<sup>st</sup> and 2<sup>nd</sup> respondents of their fruits of the judgment. Further, that the application is frivolous, vexatious and amounts to a blatant abuse of the court process as it is marred with falsehoods and raises no conceivable cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
16. The 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that the instant application is res judicata as the issues raised were addressed in rulings delivered in respect to four applications previously filed by Mr. Sirma in this case. It is deposed that in a ruling delivered on May 29, 2020, Mr. Sirma was granted a stay of execution of 60 days to enable him file a reference or appeal against the taxed bill of costs but had failed to file a reference or an appeal to date. Further, that in a ruling delivered on September 28, 2021, this court yet again dismissed Mr. Sirma's application for stay of execution.
17. The 1<sup>st</sup> and 2<sup>nd</sup> respondents deposed that Mr. Sirma's reference dated October 4, 2021 filed together with the notice of motion was filed without the leave of the Court. They threatened to file a preliminary objection against the said reference seeking to strike it out. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, Mr. Sirma had not explained the reasons for the inordinate delay in seeking to file a reference against the taxation.
18. The 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that Mr. Sirma has approached this Court with unclean hands by providing his warped and incorrect understanding of the judgment. They urged this court to take judicial notice that the execution of any decree attracts additional costs separate from those granted in the main cause. According to them, the amount which Mr. Sirma claims breached the cap placed by the Election Court are additional costs which they incurred while executing the decree. Further, that the additional costs were incurred as a result of Mr. Sirma's failure to satisfy the decree.
19. The 1<sup>st</sup> and 2<sup>nd</sup> respondents asserted that Mr. Sirma has not furnished this court with evidence of any prejudice that will be occasioned to him should this application be disallowed, whilst on their part they would be prejudicially and adversely affected as they will be denied the fruits of their judgment which they obtained after diligently litigating their cause.
20. Mr. Lessonet opposed the application through a replying affidavit sworn on November 11, 2021 by his counsel, Kibet Allan. In brief, Mr. Lessonet avers that the application is res judicata, the Court having previously rendered itself in four similar applications. According to him, Mr. Sirma has neither appealed against those decisions or filed any reference against the Deputy Registrar's taxation.



21. Mr. Lessonet contends that the only difference between this application and the previous applications is the prayer to lodge a reference out of time. He, however, avers that the prayer to file a reference out of time was granted in the ruling of the May 29, 2020 when Mr. Sirma was given sixty days to file a reference but has never done so.
22. Mr. Lessonet's position is that Mr. Sirma is simply not desirous of paying the balance of his costs and the auctioneer's fees. Further, that Mr. Sirma being a judgment debtor is by law required to pay the auctioneer's fees. He asserts that Mr. Sirma has been unwilling to comply with previously issued orders hence making a mockery of the process of this Court. His case is that the instant application is just another scheme to frustrate and curtail the respondents from enjoying the fruits of their judgment. It is deposed that Mr. Sirma has not paid the decretal amount he concedes but has continued to frustrate the respondents' attempted execution of the judgement through his numerous applications. The Court is therefore urged to dismiss the application with costs.
23. Counsel for the Applicant filed submissions dated November 26, 2021 in support of the application. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' submissions are dated December 10, 2021 whereas those of the 3<sup>rd</sup> Respondent are dated November 30, 2021. The said submissions will be taken into account in the determination of this application.
24. Upon perusal of the pleadings and the submissions of the parties in regard to the notice of motion application dated October 4, 2021, the issues that emerge for determination is whether this Court has jurisdiction to deal with the application and if so, whether the application has merit.
25. The issue of jurisdiction must be addressed first because it will determine whether this Court can delve into the substance of the applications. The respondents contend that the application is res judicata because the issues raised therein have previously been raised by the Applicant and determined by the Court. As correctly submitted by the respondents, the defence of res judicata is invoked to stop litigation between the same parties or their surrogates over issues which have been determined on merit by a court of competent jurisdiction. For a litigant to successfully invoke the doctrine of res judicata, it is necessary to establish that there is a final judgement on the current issue which is the same as the issue previously litigated between the same parties and or their privies. The principle was stated in *North West Water Ltd v Binnie & Partners* [1990] 3 All ER 547 thus:

“Where the issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between different parties arising out of identical facts and dependent on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, for the issue to be re-litigated.”
26. It was submitted that the Applicant has in the past filed four applications under which he sought orders of stay of execution premised on grounds similar to those in the current application. It is stated that in a ruling delivered on 29<sup>th</sup> May, 2020, the Applicant was granted a stay of execution for 60 days so that he could file his reference or appeal against the taxation of the bill of costs but had failed to do so. Further, that the Applicant again filed an application for stay of execution dated 7<sup>th</sup> May, 2021 and the same was dismissed on 28<sup>th</sup> September, 2021.
27. The respondents submit that the Applicant has now come to Court seeking the very same orders, albeit under slightly altered grounds. Their case is that the Applicant is estopped from seeking orders already granted and therefore properly determined by the Court. The Applicant did not respond to the issue of res judicata.



28. In *ET v Attorney General & another* [2012] eKLR, courts were warned about falling into the traps of ingenious parties thus:

“The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”

29. The respondents are correct that this court cannot deal with an issue that has previously been litigated and determined before it. The danger of allowing a party to bring one application after another in respect to the same issue will amount to allowing litigation to continue forever contrary to the principle that litigation must come to an end.

30. I have perused the record and note that the applicant has indeed filed applications seeking orders of stay of execution. In the current application, one of the prayers the Applicant seeks is “leave to lodge this reference out of time, owing to the manifest illegalities in cost claims by the respondents.” The proposed reference as contained in the Chamber Summons application dated October 4, 2021 shows that the same is aimed at challenging the taxing master’s taxation of the auctioneer’s bill of costs.

31. A perusal of the record shows that on May 29, 2020 leave was granted to the Applicant to file and secure the hearing of a reference within 60 days in respect to the taxation of the auctioneer’s costs by the taxing master. The Court concluded its order as follows:

“15. There shall, therefore, be an order for status quo to be maintained pending the hearing and determination of the reference from the Taxing Master’s taxation of the Bill of Costs. For this purpose, the stay of execution herein granted although not sought to last until the hearing of any appeal or application, shall therefore remain in force for sixty (60) days hereof, or until further orders of the court.”

32. It is therefore clear that the respondents are right that the issue of the application for leave to file a reference out of time against the taxation of the auctioneer’s bill of costs by the taxing master has already been heard and determined by this Court. The failure by the Applicant to file his reference within the stipulated period cannot be good reason for filing a similar application. The issue has already been determined by this Court and the matter is therefore res judicata. If the Applicant had any good reason for not filing the reference until the time the 3<sup>rd</sup> Respondent moved to execute the judgement, then he ought to have applied for the extension of the 60 days granted to him on May 29, 2020.

33. The other prayers in the Applicant’s notice of motion dated 4<sup>th</sup> October, 2021 were hinged on the success of the prayer for leave to file the reference out of time because they seek stay of execution pending the hearing and determination of the proposed reference. Having found the prayer for leave to file a reference out of time res judicata, the application for stay has no foundation upon which to rest. Stay of execution can only be granted where there is a future event to be protected. In this case, the future event that could have been protected by a stay order is the hearing and determination of a reference. However, the prayer to file a reference out of time has failed and there is nothing upon which an order of stay can be anchored. Likewise, the Chamber Summons application (which is the proposed reference) dated October 4, 2021 collapses together with the notice of motion because the same could only have been heard if the Applicant had been granted leave to file it out of time. The logical conclusion is that the notice of motion dated 4<sup>th</sup> October, 2021 fails in its entirety.



34. As for the notice of motion application dated January 20, 2022, it is clear that the Applicant is through that application seeking a review of a condition of the order of stay granted to him ex-parte pursuant to his notice of motion dated October 4, 2021. The notice of motion dated 4<sup>th</sup> October, 2021 has just been dismissed and it follows that any orders issued pursuant to that application have collapsed with it. In the circumstances, the order which the application dated January 20, 2022 seeks to review is no longer in existence. The application dated January 20, 2022 is therefore no longer tenable. For the record, this particular application also fails and is dismissed.
35. The question that remains is the issue of costs. Costs follow the event and the Applicant will therefore meet the respondents' costs in respect to the notice of motion application dated 4<sup>th</sup> October, 2021.
36. As for the notice of motion dated 22<sup>nd</sup> January, 2022, I note that directions were issued in regard to its hearing and the respondents did indeed file their responses and submissions in respect to the same. They are therefore entitled to payment in respect to the work done. As such, the respondents are also awarded costs against the Applicant in respect of the notice of motion application dated 22<sup>nd</sup> January, 2022. For avoidance of doubt, and for purposes of clarity, the Applicant (Mr. Sirma) will pay the respondents' costs in respect of the applications dated 4<sup>th</sup> October, 2021 and 22<sup>nd</sup> January, 2022.

**DATED, SIGNED AND DELIVERED AT KABARNET THIS 30<sup>TH</sup> DAY OF JUNE, 2022.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

